# Quek Gin Hong v Public Prosecutor

HIGH COURT (MELAKA) — CRIMINAL REVISION NO 42-17 OF 1997
SURIYADI J
17 AUGUST 1998

***Criminal Law*** *— Environmental Quality (Clean Air) Regulations 1978 — Allowing open burning without licence — Whether an offence known to law — Environmental Quality (Clean Air) Regulations 1978 reg 12*

***Criminal Procedure*** *— Prosecution — Right to conduct prosecution — Director General granted powers to prosecute at par with the Public Prosecutor — Whether void for inconsistency with art 145(3) of the Federal Constitution — Environmental Quality Act 1974 s 44 — Federal Constitution art 145(3) — Criminal Procedure Code (FMS Cap 6) s 422*

The accused was charged for allowing open burning of certain vegetation waste without a licence contrary to reg 12 of the Environmental Quality (Clean Air) Regulations 1978 ('the Regulations'). He was found guilty and sentenced to six months' imprisonment. Counsel for the accused requested for a revision on the grounds that: (i) s 44 of the Environmental Quality Act 1974 ('the Act') — which provides for the prosecution of offences under the Act by the Director General — was ultra vires art 145(3) of the Federal Constitution; (ii) there was no written authority to prosecute from the Public Prosecutor pursuant to s 377 of the Criminal Procedure Code (FMS Cap 6) ('the CPC'); and (iii) he was charged for an offence which was unknown to law. A further issue was whether s 422 of the CPC would save the sentence if there was want of authorization to prosecute.

**Held**, setting aside the order and acquitting the accused:

(1) Section 44 of the Act which endowed the Director General with powers at par with the Public Prosecutor was void for inconsistency with art 145(3) of the Federal Constitution (see pp 164H–I and 165A); *Repco Holdings Bhd v PP* [1997] 3 MLJ 681 followed. Therefore, any documented authorization emanating from the Director General was worthless and would not validate any shortcomings in the want of authority to prosecute (see p 165G–H).

(2) Section 422(a) of the CPC was inapplicable in this case as it anticipated some form of error, omission or irregularity in a sanction or consent that was earlier issued. Further, since nothing was built into the Act which requireed a sanction similar to that of s 129 of the CPC, s 422(b) was also inapplicable. Moreover, the amended s 422 may not save the case since the want of authorization to prosecute had caused a failure of justice (see p 166E–I).

(3) Regulation 12 of the Regulations does not create an offence as it merely lays down the factors for the subjective consideration of the Director General prior to the granting of any licence to carry out open burning. Even if this were not so, there was absolutely no evidence to connect the accused with the ownership of the land or the cause of the fire (see pp 167G–I and 168A–C).

(4) In the normal course of events, for cases where the orders of judges were set aside on the ground of nullity, the substitute orders would invariably be to discharge the accused persons not amounting to an acquittal. However, in this case, an order of acquittal would be appropriate (see p 168E–G).

**[Bahasa Malaysia summary**

Tertuduh dipertuduhkan kerana membenarkan pembakaran terbuka sisa-sisa tumbuhan tertentu tanpa lesen bertentangan dengan peraturan 12 Peraturan-Peraturan Kualiti Alam Sekeliling (Udara Bersih) 1978 ('Peraturan tersebut'). Ia didapati bersalah dan dijatuhkan hukuman penjara selama enam bulan. Peguam tertuduh meminta penyemakan atas alasan bahawa: (i) s 44 Akta Kualiti Alam Sekeliling 1974 ('Akta tersebut') — yang memperuntukkan pendakwaan kesalahan di bawah Akta tersebut oleh Ketua Pengarah — adalah ultra vires perkara 145(3) Perlembagaan Persekutuan; (ii) tiada kebenaran bertulis untuk mendakwa daripada Pendakwa Raya menurut s 377 Kanun Acara Jenayah (NMB Bab 6) ('KAJ'); dan (iii) ia dipertuduhkan untuk kesalahan yang tidak dikenali di sisi undang-undang. Isu lanjut adalah sama ada s 422 KAJ boleh menyelamatkan hukuman sekiranya terdapat kekurangan pemberikuasaan untuk mendakwa.

**Diputuskan**, mengetepikan perintah dan membebaskan tertuduh:

(1) Seksyen 44 Akta tersebut yang mengurniakan Ketua Pengarah dengan kuasa yang selaras dengan Pendakwa Raya adalah tak sah kerana tak konsisten dengan perkara 145(3) Perlembagaan Persekutuan (lihat ms 164H–I dan 165A); *Repco Holdings Bhd v PP* [1997] 3 MLJ 681 diikut. Maka, sebarang pemberikuasaan berdokumentasi yang datang dari dari Ketua Pengarah adalah tidak bernilai dan tidak akan menjadikan sah apa-apa kelemahan dalam kegagalan pemberikuasaan untuk mendakwa (lihat ms 165G–H).

(2) Seksyen 422(a) KAJ tidak terpakai dalam kes ini kerana ia menjangkakan kesilapan, peninggalan atau luar aturan dalam sanksi atau kebenaran yang diberikan dahulu. Selanjutnya, oleh kerana tiada apa-apa telah dimasukkan ke dalam Akta tersebut yang menghendaki sanksi yang serupa dengan s 129 KAJ, s 422(b) juga tidak terpakai. Tambahan pula, s 422 yang terpinda tidak menyelamatkan kes kerana kegagalan pemberikuasaan untuk mendakwa telah menyebabkan kegagalan keadilan (lihat ms 166E–I).

(3) Peraturan 12 Peraturan tersebut tidak mewujudkan suatu kesalahan kerana ia cuma menyatakan faktor-faktor untuk pertimbangan subjektif Ketua Pengarah sebelum memberikan apa-apa lesen untuk menjalankan pembakaran terbuka. Biarpun ini tidak dilakukan, tiada keterangan langsung untuk mengaitkan tertuduh dengan pemilikan tanah atau punca kebakaran (lihat ms 167G–I dan 168A–C).

(4) Dalam keadaan biasa, untuk kes-kes di mana perintah hakim diketepikan atas alasan pembatalan, perintah pengganti selalunya adalah untuk melepaskan tertuduh tidak terjumlah kepada pembebasan. Namun demikian, dalam kes ini, suatu perintah pembebasan adalah wajar (lihat ms 168E–G).]

**Notes**

For a case on right to conduct prosecution, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) para 2040.

**Cases referred to**

*Abdul Hamid v PP* [1956] MLJ 231 (refd)
*Hassan bin Ishak v PP* [1948–49] MLJ Supp 179 (refd)
*Kyohei Hosoi v PP* [1998] 1 CLJ 1063 (refd)
*Lyn Hong Yap v PP* [1956] MLJ 226 (refd)
*Mohd Dalhar bin Redzwan & Anor v Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 1 MLJ 645 (refd)
*Ng Song Luak v PP* [1985] 1 MLJ 456 (refd)
*Periasamy & Anor v PP* [1993] 2 MLJ 551 (refd)
*R v Metz* 11 Cr App R 164 (refd)
*Repco Holdings Bhd v PP* [1997] 3 MLJ 681 (folld)
*R v Retnam* [1934] MLJ 6 (refd)
*Salleh and Husin v R* (1908) 10 SSLR 27 (refd)

**Legislation referred to**

Criminal Procedure Code (FMS Cap 6) ss 129(3), 305, 376(1), 377, (b)(3), 422, (a)
Criminal Procedure (Amendment) Act 1998 (Act A1015)
Environment Quality Act 1974 ss 22(3), 44
Environmental Quality (Amendment) Act 1998 (Act A1030)
Environmental Quality (Clean Air) Regulations 1978 reg 12
Federal Constitution arts 4, 145(3)

*Low Kian Boon (JA Nathan & Co)* for the accused.
*Anselm Charles Fernandis* (State Legal Advisor's Chambers) for the Public Prosecutor.

**Suriyadi J**: The accused was supposed to have committed an offence on 20 September 1997, with a report filed against him on 27 September

1997. He was later charged, and found guilty pursuant to a plea of guilt before the sessions court judge on 17 November 1997. He was thenceforth sentenced to six months imprisonment. For completeness, permit me to reproduce the charge, which reads:

> Bahawa kamu Quek Gin Hong pada 20 September 1997 jam lebih kurang 11.00 pagi di Lot DSPN 21, 24, 25, 26, 27 dan 28, Mukim Machap, Daerah Alor Gajah, di dalam Negeri Melaka, sebagai kontraktor, didapati tanpa lesen di bawah s 22(1) Akta Kualiti Alam Sekitar 1974 telah membiarkan pembakaran terbuka terhadap bahan-bahan yang boleh terbakar (sisa-sisa tumbuhan) berlawanan dengan syarat yang boleh diterima di bawah peraturan 12 Peraturan-Peraturan Kualiti Alam Sekeliling (Udara Bersih) 1978 dan boleh didenda di bawah s 22(3) Akta Kualiti Alam Sekeliling (Pindaan) 1996.

Pursuant to s 305 of the Criminal Procedure Code (FMS Cap 6), an accused's right of appeal is limited only to the extent and legality of the sentence. In compliance with this provision, the accused filed the notice of appeal on 20 November 1997, as against the excessive severity of the sentence. On 26 January 1998, the court received a letter from the accused's counsel, requesting for a revision in spite of having filed that appeal. This route taken by the accused is not improper, as once an appeal has been lodged, the latter is not prevented from contending that the conviction is illegal, and thenceforth request the judge to act in revision (*Mohd Dalhar bin Redzwan & Anor v Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 1 MLJ 645).

Having received that letter, and having understood the consternation of the accused's counsel, I accordingly called up the file. On 17 August 1998 after hearing the case, I set aside the order and acquitted the accused. I now give my reasons for that decision. In principle, there were three main grounds which persuaded me to arrive that decision, namely:

(1) s 44 of the Environment Quality Act 1974 ('Act 127'), is ultra vires art 145(3) of the Federal Constitution;

(2) there was no written authority to prosecute from the Public Prosecutor, pursuant to s 377 of the Criminal Procedure Code; and

(3) that he was charged for an offence under peraturan 12, Peraturan-Peraturan Kualiti Alam Sekeliling (Udara Bersih) 1978, punishable under s 22(3) of the Akta Kualiti Alam Sekeliling (Pindaan) 1996, an offence which is unknown to law.

Built into the Environmental Quality Act 1974 is s 44 which provides for the power and conduct of the prosecution. This provision reads:

> Prosecutions in respect of offences committed under this Act or regulations made thereunder may be conducted by the Director General or any officer duly authorized in writing by him or by any officer of any local authority to which any powers under this Act has been delegated.

A simple reading of this provision, and without having to produce a lengthy dissertation of it, highlights another glaring example of a Director General being endowed with powers at par with the Public Prosecutor.

I need only say that the power of prosecution is the exclusive domain of the Public Prosecutor, and as such this provision is void for inconsistency, with art 145(3) of the Federal Constitution. Article 4 of the Federal Constitution, in crystal clear terms, has provided that the Federal Constitution is the supreme law of the Federation, and any law passed after Merdeka Day, which is inconsistent with this Constitution, to the extent of the inconsistency, is void (*PP v Chua Chor Kian* [1998] 1 MLJ 167). For easy reference I reproduce art 145(3) of the Federal Constitution, which reads:

> The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court-martial.

To streamline this article, it is further supplemented by s 376(1) of the Criminal Procedure Code which reads:

> The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under the Code.

To carry out his onerous and manifold functions smoothly, he may authorize certain officers to conduct the prosecution, as provided for under s 377 of the Criminal Procedure Code, as amended by Act A1015. This section reads:

> Every criminal prosecution before any court and every inquiry before a Magistrate shall, subject to the following sections, be conducted —
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> ...
>
> (b) subject to the control and direction of the Public Prosecutor, by the following persons who are authorized in writing by the Public Prosecutor:
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> ...
>
> (3) an officer of any Government department; ... .

On the premise that the Director General is not conferred with the power to institute or conduct any prosecution, then needless to say he is powerless to delegate authority, or for anyone else to prosecute on his behalf. On that account, any documented authorization emanating from the Director General is worthless and will not validate any shortcomings in the want of authority to prosecute. It must have dawned upon the relevant authorities of the void in the sphere of prosecution, as Parliament subsequently promulgated the Environmental Quality (Amendment) Act 1998 ('Act A1030'). In spite of the passing of that Act, as the relevant Minister has yet to notify the effective date in the *Gazette*, the present s 44 with all the debilitating defects are still left untouched in the statue, the amended s 44, for purposes of an academic discussion of the problem at hand, reads:

> No prosecution shall be instituted for an offence under this Act or the regulations made thereunder without the consent in writing of the Public Prosecutor.

This new amended provision will bring in line Act 127, with art 145(3) of the Federal Constitution and s 376 of the Criminal Procedure Code, in

that future prosecutions by officers of the Environmental Department will be flawless. Any consent obtained from the Public Prosecutor will entail deep consideration by the latter, as compared to a sanction. To quote Smith J in *Abdul Hamid v PP* [1956] MLJ 231 at p 232:

> ... full consideration is required for consent since 'consent' is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side (1 *Stroud* (3rd Ed) at p 582).

On 1 April 1998, conservatively about six months after the accused was sentenced, the Criminal Procedure (Amendment) Act 1998 ('Act A1015') came into effect. This latter Act amended the Criminal Procedure Code, inter alia, s 422 which reads:

> Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of —
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> (a) any error, omission or irregularity on the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code;
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> (b) the want of any sanction; or
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> (c) the improper admission or rejection of any evidence,
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> unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

For purposes of the current case, s 422(a) is inapplicable as it anticipates some form of error, omission or irregularity in a sanction or consent (both statutorily provided to be in writing, eg a sanction must be in writing as provided in s 129(3) of the Criminal Procedure Code; *R v Retnam* [1934] MLJ 6) that was earlier issued. As none were issued by the Public Prosecutor, it is unnecessary for me to consider this subsection. Having eliminated this subsection, the next provision left for consideration is sub-s (b) which is capable of saving the court's sentence or order. Under the Criminal Procedure Code, the specific provision is s 129 of the Criminal Procedure Code which lays down certain offences that require the sanction of the Public Prosecutor. It is silent as to the requirement of sanction for other specific Acts. In brief, a sanction is an order directing the prosecution of a certain person, and in the ordinary way, that order is conveyed to the authorities who are responsible for initiating prosecution in the locality in question. Within the Environmental Quality Act 1974, nothing is built into it which requires a sanction similar to that of s 129 of the Criminal Procedure Code. On that score, s 422(b) of the Criminal Procedure Code is also inapplicable for the current case.

In spite of its draconian effect, this amended s 422 may not save completed flawed cases, if it occasions a failure of justice. This amended section, as I see it, is no different from the views held by Hyndman-Jones CJ in *Salleh and Husin v R* (1908) 10 SSLR 27, when his Lordship opined that the want of sanction or complaint under the then s 135 of the Criminal Procedure Code did not vitiate a conviction, unless there was evidence that a failure of justice had been occasioned. Without prejudging

the evidence, how could it not attract a failure of justice in this case, when the Public Prosecutor never even had the opportunity to peruse the file. The Public Prosecutor was unaware of this prosecution, much to the chagrin of the accused who had been deprived of his constitutional right. At the risk of repeating, injustice had occurred here when:

(1) the prosecuting officer of the Environmental Quality Department did not possess the written authorization from the Public Prosecutor, pursuant to s 377(b)(3) of the Criminal Procedure Code. It must be stressed that the letter of authorization pursuant to s 377(b) is not of the same strength and quality as a sanction pursuant to s 129 of the Criminal Procedure Code which requires due consideration by the Public Prosecutor (*Salleh and Husin v R*);

(2) the Public Prosecutor was totally oblivious to the prosecution, and never had the opportunity to peruse and decide on the viability of the prosecution. If the accused had the priviledge of the highest placed legal brain in the country perusing the investigation papers, he might not even have been charged. A perusal of the notes of the proceeding will confirm that he had been deprived of relevant substantive legal protection devised by law, for a person who is supposed to be innocent before being found guilty;

(3) the initiation of the prosecution of the accused was pursuant to a provision ultra vires the Constitution. This was not a case of a person charged after having received the concurrence of the Public Prosecutor, subsequently flawed by technicalities, but a prosecution founded on illegality from the beginning (*Lyn Hong Yap v PP* [1956] MLJ 226; *R v Metz* 11 Cr App R 164. See the case of *Hassan bin Ishak v PP* [1948–49] MLJ Supp 179 where Pretheroe ACJ as regards the matter on trial, opined that in the absence of the sanction of the Public Prosecutor the proceedings at the lower courts were null and void); and

(4) the factor of being charged under reg 12 which does not create an offence (*Periasamy & Anor v PP* [1993] 2 MLJ 551). For clarification, I reproduce reg 12 which reads:

> A licence to carry out open burning may be granted if the Director General is satisfied that —
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> (i) open burning is the only economically practicable method of disposal; and
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> (ii) such open burning is not likely to cause pollution.

This is a provision that lays down the factors for the subjective consideration of the Director General prior to the granting of any licence. There is no reference under this provision to the ingredient of 'membiarkan pembakaran terbuka terhadap bahan-bahan yang boleh terbakar (sisa-sisa tumbuhan) berlawanan dengan syarat yang boleh diterima di bawah peraturan 12'.

In the event this expression of 'membiarkan pembakaran terbuka' falls within the ambit of the words 'cause' (menyebabkan), 'allow'

(membenarkan/membiarkan) and 'permit' (mengizinkan), all these words involve power and rights. To exercise all these powers, and fall within the ambit of these words, the offender must be the owner of the material land or a person having acquired the powers of the owner. In open court, I was informed in no uncertain terms that the accused was not the owner of the land. The report and the facts of the case are silent as to that fact or of the accused's relationship with the land and the fire. Since there was absolutely no evidence to connect the accused with those two factors, I was therefore dissuaded from framing a charge based on reg 11 of the Environmental Quality (Amendment) Act 1996 (*Ng Song Luak v PP* [1985] 1 MLJ 456).

As s 44 of the Environmental Quality Act is ultra vires the Constitution, with s 422 of the Criminal Procedure Code being inapplicable for the current case, I was therefore guided and bound by *Repco Holdings Bhd v PP* [1997] 3 MLJ 681. In that case, the prosecution was also invalidated due to the want of authority to prosecute from the Public Prosecutor. In this case, by analogy as no authorization was obtained from the Public Prosecutor, this prosecution therefore was illegal (see also *Kyohei Hosoi v PP* [1998] 1 CLJ 1063). Pursuant to all the above reasons, I acquitted and discharged the accused. As much as the country is being beset by atmospheric pollution, and spearheaded by every responsible department to ensure that the haze does not rear its ugly head again, the law and rights of individuals must not be compromised. In the normal course of events, for cases where the orders of judges are set aside on ground of nullity, the substitute orders will invariably be to discharge the accused persons not amounting to an acquittal. In this case, the Public Prosecutor could not be said to be interested in the prosecution, as the case was never even within his knowledge in the first place, for no fault of his. Reverting to the predicament of the accused, had it not been for this revision, he would now be deprived of six months of freedom, due to the infringement of his constitutional rights. Having gone through the turmoil of uncertainty, brought about by an illegal prosecution, let alone a charge that will not stand, this order therefore would be an appropriate one.

*Accused acquitted and discharged.*

Reported by Loo Lai Mee